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IN THE

Supreme Court of the United States

OCTOBER TERM 1980

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

H & D, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether an impasse in collective bargaining negotiations justifies an employer's unilateral withdrawal from bargaining.

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STATEMENT OF THE CASE

1. H & D, Inc., is a Washington corporation engaged in the manufacture of aluminum doors and windows. For the time period preceding the dispute which gave rise to this case, the Ironworkers Shopmen Local Union No. 506 served as the collective bargaining representative for about one half of H & D production employees. As a

general practice in prior contract negotiations with the union, H & D would bargain jointly with two other employers, Bel-Window and Herzog Aluminum Co., even though there was no duly organized employer's bargaining unit, nor any formal bargaining agreement.

The negotiations which gave rise to this action began in early 1977 when the union sent out reopening letters and contract proposals to H & D, Bel-Window, and Herzog Aluminum for a contract to succeed the agreement that was to expire later that year. Between the first bargaining session on February 22 and April 20, seven bargaining sessions were held without substantial agreement as to the terms of the new contract. Two employer proposals were decisively rejected by the union members. On April 25, a third employer's proposal was submitted to the union membership for ratification but was

defeated by a vote of 28 to 14. The union then unanimously elected to strike and commenced picketing two days later.

During the negotiations for a new contract, the H & D employee union members met several times to discuss their dissatisfaction with their union representation. When an employer proposal was rejected on April 2, almost all of the H & D employees submitted written resignations from the union and attempted to file a decertification petition with the NLRB. The decertification petition was apparently procedurally defective and was later withdrawn by the employees. None of H & D's employees participated in the strike authorized by the April 25 vote.

On April 18, H & D asked to withdraw from negotiations because of its employees' resignation from the union, but the union would not consent. At the beginning of May, several days after the strike began,

the union proposed resubmitting the contract, rejected by the rank-and-file on April 25, for a vote on May 3. The reconsideration vote was scheduled but then cancelled. The general manager of H & D notified the union by a letter dated May 3 that a bargaining impasse had been reached when the union suggested a second vote on a prior proposal which had been turned down by the membership, and because of the impasse they were withdrawing from the contract negotiations.

2. The union subsequently filed charges against H & D for refusing to bargain as part of the multiemployer group, and a hearing was had before the administrative law judge on August 18, 1977. The administrative law judge found that H & D had not committed an unfair labor practice by withdrawing from the joint negotiations because there was no multiemployer bargaining unit as defined by the National Labor

Relations Board decision. Finding of Fact and Conclusions of Law of Administrative Law Judge Sahm, October 3, 1978. Petitioner's App. C, 50a. The administrative law judge did not make a finding concerning an impasse in negotiation because of the NLRB's decision in NLRB v. Hi-Way Billboard, Inc., 206 N.L.R.B. 22 (1973), enforcement denied, 500 F.2d 181 (5th Cir. 1974) where the Board indicated that even a genuine impasse did not create an "unusual circumstance" allowing the unilateral withdrawal of an employer from bargaining. Nor did the administrative law judge address H & D's contention that tne en masse resignation of its employees from the union created an "unusual circumstance" justifying withdrawal from negotiations. 3. On review before the NLRB the Board rejected the administrative law judge's conclusion that there was no multiemployer

bargaining unit at the time of H & D's withdrawal, but instead found that based on the controlling history of the collective bargaining an employer bargaining unit did exist. Addressing the contention that the bargaining impasse created an "unusual circumstance" justifying H & D's withdrawal, the Board summarily concluded "that the evidence does not establish that an impasse existed. . . ." H & D, Inc., 240 N.L.R.B. No. 161, p. 3 (1979). Finally, the Board concluded that the resignation of H & D's employees from the union did not create an "unusual circumstance" allowing its withdrawal. The Board ordered H & D to bargain with the Union as representatives of its employees in the established multiemployer unit. Petitioner's App. C, 11a-18a.

4. The court of appeals found that a bargaining impasse did exist at the time of H & D's withdrawal. The court held that an

impasse is an "unusual circumstance" that justifies an employer's otherwise untimely withdrawal, and accordingly denied enforcement of the Board's order. Petitioner's App. A, 6a-9a. The court did not find it necessary to reach the question of whether a multiemployer bargaining unit existed or whether the en masse resignation of H & D's employees from the union was an "unusual circumstance" permitting employer withdrawal. Petitioner's App. A, 9a.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should not be granted in this case because there is not a genuine conflict among the federal courts of appeals decisions regarding whether an impasse in collective bargaining negotiations justifies an employer's unilateral withdrawal from bargaining.

ARGUMENT

A review on certiorari "is not a matter of right, but of judicial discretion", and "will be granted only when there are special and important reasons". R. 17.1. Differences among federal courts of appeals will not likely be accepted as a sufficient conflict to warrant the granting of a petition for a writ of certiorari "if they can fairly be accounted for on the basis of variations in the factual situation among the cases involved". Harlan, Manning The Dikes (1958) 13 Record NYCBA 541, 552.

The petitioner cites two court of appeals decisions which hold that the occurrence of an impasse in the course of collective bargaining does not enable an employer unilaterally to withdraw from bargaining, N.L.R.B. v. Charles D. Bonanno Linen Service, Inc., 243 N.L.R.B.

No. 140, enforced, 630 F.2d 25 (1st Cir. 1980), petition for cert. pending, No. 80-931, and N.L.R.B. v. Marine Machine Works, 635 F.2d 522 (5th Cir. 1981). Both of those cases are factually different from the case involved in this petition.

First, in both of these cases cited by the petitioner, the employer was a member of a multiemployer group. The court of appeals in this case did not decide whether or not H & D was a member of such a group. Petitioner's App. A, 9a. Such a distinction would make a difference as to whether an impasse would justify unilateral employer withdrawal from bargaining. If H & D was not a member of a multiemployer group, its actions in withdrawing would not affect the negotiations of any other employer in the group or the ultimate acceptability of any agreement reached by the employers who continued to bargain, as was the case in Charles D. Bonanno, supra.

The second factual difference is that, in both of these cases cited by the petitioner, the court is careful to note that, after the bargaining impasse had been reached, no interim agreement was reached between the union and any employer nor was any such arrangement seriously attempted. In the present case, the employees of H & D evidenced their intent to reach an agreement by their unsuccessful attempt to resign from the union and file a decertification petition. The importance of this factual difference is explained in several cases. Allowing the union to reach interim agreements with individual employers in a multiemployer bargaining unit, and not allowing the other employers to withdraw from bargaining when an impasse had been reached, leaves the members of the multiemployer group without interim agreements watching "certain of their withdrawing competitors resume business while they

themselves were still in the throes of an economic strike." NLRB v. Independent Ass'n of Steel Fabricators, Inc., 582 F.2d 135, 147 (2d Cir. 1978). See also, NLRB v. Hi-Way Billboards, Inc., 500 F.2d 181 (5th Cir. 1974); NLRB v. Associated Shower Door Co., ,512 F.2d 230 (9th Cir.), cert. denied, 423 U.S. 893, 96 S. Ct. 191, 46 L. Ed. 2d 125 (1975). The court in NLRB v. Beck Engraving Co., 522 F.2d 475, 483 (3d Cir. 1975) stated the problem as follows:

> The union . . . should not have been given two weapons for its economic arsenal (i.e. the selective strike and individual negotiations) while the employers are given only one (viz., the lockout).

To correct this imbalance, the courts have allowed the employers to have the ability to withdraw from bargaining upon impasse. Authorized Air Conditioning Co. v. NLRB, 606 F.2d 899 (9th Cir.), cert. denied, 455 U.S. 950, 100 S. Ct. 1598, 63 L. Ed. 2d

785 (1980); Fairmont Foods Co. v. NLRB, 471 F.2d 1170 (8th Cir. 1972); Jaime Andino d/b/a Jamie Andino Trucking, 619 F.2d 147 (1st Cir. 1980); NLRB v. Acme Wire Works, Inc., 582 F.2d 158 (2d Cir. 1978).

With the distinguishable exceptions of Charles D. Bonanno, supra, and Marine Machine Works, supra, all of the other cases cited by the petitioner in their petition, and all the cases found by the respondent in the course of research, hold that the occurrence of a genuine impasse does justify an employer's unilateral withdrawal from bargaining. Two of the above cited cases, NLRB V. Associated Shower Door Co., and Authorized Air Conditioning Co., are both Ninth Circuit decisions and a writ of certiorari was denied in both cases, in one case in 1980.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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